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**SUPREME COURT OF THE UNITED**

**OCTOBER TERM, 1939**

**No. 1033**

**95**

**HUMBLE OIL & REFINING COMPANY ET AL.,**

*Petitioners,*

*vs.*

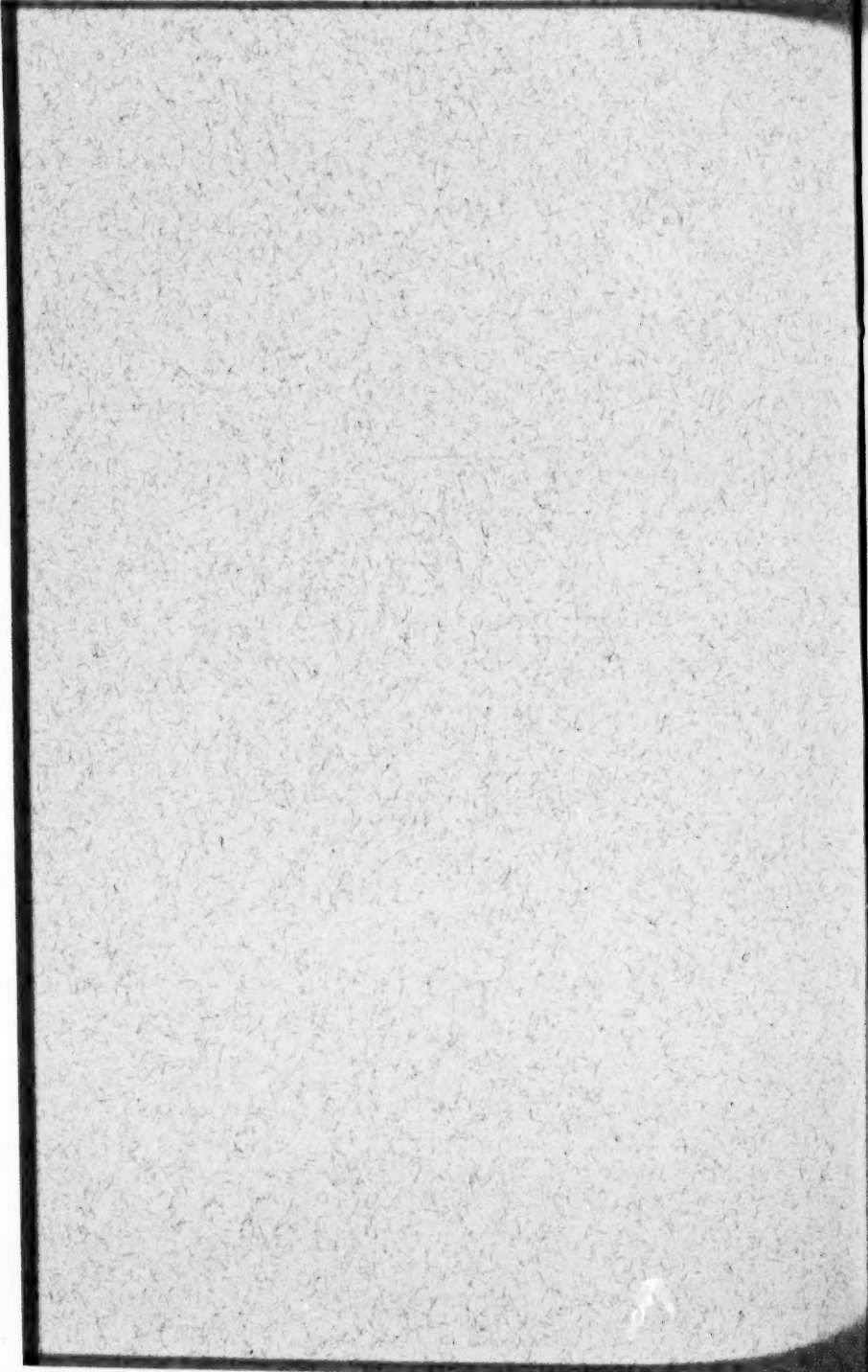
**W. C. TURNBOW ET AL.**

**PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CIVIL APPEALS IN AND FOR THE  
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS**

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**MAY IT PLEASE THE COURT:**

Petitioners, Humble Oil & Refining Company and Gulf Oil Corporation, respectfully show to the Court:

**A.**

**Opinion Below.**

The opinion of the Court of Civil Appeals (R. 353) is reported in 133 S. W. (2d) 191. Opinions deciding prior suits involving the safe land and wells are reported in 90 S. W. (2d) 663 and 99 S. W. (2d) 1096 (Writ refused by Supreme Court of Texas).

## B.

**Summary Statement of the Matter Involved.**

Humble Oil & Refining Company, as plaintiff below, brought this suit to cancel an order of the Railroad Commission of Texas (R. 25) granting W. C. Turnbow and W. C. Turnbow Petroleum Corporation permit to drill and operate two wells for oil and gas on 2½ acres of land, in exception to the said Commission's well spacing rule applicable to the East Texas Field. Defendants below, respondents here, are the permittees, the Railroad Commission of Texas and the members thereof. Gulf Oil Corporation intervened, seeking the same relief as the plaintiff.

Said rule, adopted under the oil and gas conservation statutes (*Ver. Tex. Stats., 1936, Arts. 6014, 6029*), on findings that such general rule is necessary to prevent waste of oil and gas (R. 46-47, 220, 222), provide in substance that no wells shall be drilled at lesser distances than 660 feet from other wells and 330 feet from property lines (i. e., ten acre spacing), "provided that the Commission in order to prevent waste, or to prevent the confiscation of property, will grant exceptions to permit drilling within shorter distances \* \* \* whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent confiscation of property" (R. 47, 193). The locations involved are 48 feet and 100 feet, respectively, from boundaries, and 100 feet and 200 feet, respectively, from other wells on the 41 acre tract presently mentioned (R. 350A).

Suit to cancel such order is expressly authorized by State law (*Ver. Tex. Stats, 1936, Art. 6049c, Sec. 8*), providing that any interested person affected by any order made by the Commission and who may be dissatisfied therewith, shall have the right to file a suit against the Commis-

sion or the members thereof, to test the validity of such order; and that in such trials, the burden of proof shall be upon the party complaining, and the order complained of shall be deemed *prima facie* valid.

Plaintiff's petition in the District Court attacked the order on the grounds, among others, that (1) the permit order was arbitrary because unsupported by any substantial evidence at the hearing before the Commission (R. 17-18), and (2) was unjust, unreasonable, illegal, and discriminatory in fact as to petitioners, for the reason that it gave the permittees, the 2½ acres, and the 41 acre tract from which it was subdivided after the effective date of the rule (of which it must be considered a part in the administration of the rule, under the express provisions thereof, as recognized in the opinion of the Court of Civil Appeals (R. 356), an undue number of wells, an undue spacing advantage, and an undue advantage in allowable production per acre per day under the Commission's proration order, which was on a per well basis, allowing each tract to produce in proportion to its number of wells rather than in proportion to its underlying oil reserves, discriminated in favor of the permittees against petitioners, by giving the permittees a great advantage in drainage opportunity over petitioners, which the Commission could and should have prevented or lessened, enabling them to drain petitioners' oil, thereby taking petitioners' property without due process of law, and denying them the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States (R. 17, 21-22). Gulf Oil Corporation, in its intervention, adopted these allegations (R. 30).

On the trial, petitioners introduced the record of testimony and exhibits at the hearing before the Commission, to establish petitioners' first ground of attack, for the limited purpose of showing what the Commission had before

it; and also introduced, on its second ground of attack, testimony *which was not disputed by any other witness at the trial*, showing the involved locations are not in fact necessary under either ground of exception to the rule, but will cause waste of oil and gas, drain large and inestimable quantities of oil from petitioners' leases, in that it gave the permittees, the 2½ acres, and the 41 acres an advantage in well spacing and density of drilling over the neighboring leases, including petitioners', resulting under the proration order in enabling them to drain large amounts of petitioners' oil during the life of the field, which petitioners could not entirely prevent, even by drilling offset wells; that petitioners have reasonably developed their property by the existing wells. This testimony is detailed hereinafter. Defendants offered no evidence on the trial. At the close of petitioners' evidence, the trial court, on defendants' motion (R. 41), entered judgment against petitioners, reciting that there was substantial evidence before the Commission to support the permit order, and that petitioners had failed to sustain the burden of proof (R. 41).

By assignments of error, petitioners presented to the Court of Civil Appeals the Federal questions here presented: (1) under the undisputed testimony adduced on the trial, the permit order is in fact unreasonable and illegal and enables the permittees to drain, take, and confiscate to their own use and benefit property of petitioners, without due process of law, and denies petitioners the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States; and (2) the failure of the court to consider the evidence independently adduced on the trial and to make an independent judicial determination of the facts as a basis for ruling on such constitutional question of itself denies petitioners due process of law, in violation of said constitutional provision (R. 351-353). On appeal, the Court of Civil Appeals affirmed judgment of the

trial court on the sole ground that there was substantial evidence before the Commission supporting the permit, mentioning but disregarding the contrary testimony on the trial (R. 356-457). It held that the mere fact that evidence was offered before the Commission tending to support the order ended the inquiry, and the court failed and refused to weigh, consider, or give effect to the undisputed testimony independently adduced on the trial; and failed and refused to make or require to be made an independent judicial determination of the facts.

### C.

#### **Statement of the Basis Upon Which it is Contended that this Court has Jurisdiction to Review the Judgment in Question.**

(a) *U. S. C. A., Title 28, Sec. 344 (Judicial Code, Sec. 237, amended), subparagraph (b).*

(b) The judgment of the Court of Civil Appeals sought to be reviewed is dated October 18, 1939 (R. 358). Petitioners on November 2, 1939 (being timely under the State Law, *Ver. Tex. Stats., 1936, Art. 1877*), filed their motion for rehearing and request for findings of fact and conclusions of law in the Court of Civil Appeals (R. 358-364), and said court entertained and overruled said motion on November 15, 1939 (R. 365).

The judgment of the Court of Civil Appeals is a final judgment. While the case is not one in which, under Texas statutes, the judgment of the Court of Civil Appeals is conclusive on both law and facts and one in which writ of error from the Supreme Court of Texas is not allowed (*Ver. Tex. Stats. 1936, Art. 1821*), but is a case within the appellate jurisdiction of the Texas Supreme Court (*Ver. Tex. Stats., 1936, Art. 1728*), the final judgment of the Court of Civil

Appeals is, nevertheless, that of the highest State court in which a decision could be had, in view of the refusal by the Texas Supreme Court to exercise its discretionary power to review the decision. Petitioners in due time (*Ver. Tex. Stats., 1936, Art. 1742*) filed their petition to the Texas Supreme Court for a writ of error on December 15, 1939 (R. 365), and same was entertained and refused on January 3, 1940 (R. 368). Petitioners then filed, on January 18, 1940 (R. 370), their motion for rehearing in the Supreme Court, same being timely and authorized by State law (*Ver. Tex. Stats., 1936, Arts. 1750, 1762*), and the Supreme Court entertained said motion and overruled it on January 24, 1940 (R. 370), from which latter date the time for applying to this Court for further review begins to run. *American Railway Express Co. v. Levee*, 263 U. S. 19, 20, 21, 44 S. Ct. 11, 12; *Citizens Bank of Michigan City, Ind., v. Opperman*, 249 U. S. 448, 450, 39 S. Ct. 330, 331; *Texas Pacific Railway Co. v. Murphy*, 111 U. S. 488, 4 S. Ct. 497, 498.

(c) The nature of this case and the rulings of the court below are such as to bring this case within the jurisdictional provisions relied upon. The Railroad Commission of Texas controls both the number of wells which may be drilled and the amount of oil that may be produced, so that operators are no longer able to fend for themselves in the protection of their property from drainage of the underlying oil resources, and under the proration order, an operator who is granted by the Commission more wells than his neighbors in proportion to the acreage of each, or more wells than are necessary to protect his own property from drainage, receives a greater allowable per acre and, due to the uniformity of sand conditions and oil content in localized areas, obtains a drainage advantage over his neighbors under the proration order, enabling him to drain and produce indefinitely in the future oil from his neighbors as certainly

as if he were permitted to drill a well on his neighbors' land. This is the nature of the confiscation and discrimination brought about by the Commission's order here attacked as violative of petitioners' constitutional rights, which point they expressly pleaded as a Federal question in the trial court, and have preserved at each successive step since. That such point presents a Federal question is supported by this Court's decision in *Thompson v. Consolidated Gas Utilities Corporation*, 300 U. S. 55, 57 S. Ct. 364, wherein it was held that a Commission order which would result in drainage of large quantities of gas from complainant's property to the property of others, takes property from one and gives to another, and would violate the Federal Constitution. The same holding has been applied to taking oil by drainage in *Railroad Commission v. Rowan & Nichols Oil Company*, 107 F. (2d) 70, wherein the Circuit Court of Appeals, 5th Circuit, held that a proration order confiscated the property of complainant in violation of the Fourteenth Amendment to the Constitution of the United States in that it was proved that the result of the order would be to cause complainant to lose approximately one-half of its oil by drainage to wells of others. The same question is here presented, in that the same resulting drainage will be accomplished from petitioners' leases through giving permittees and the 41 acre tract of which permittees' tract is a part for administrative purposes an undue number of wells, enabling them to drain large quantities of oil from petitioners' leases. (See also opinion of United States District Court in *Rowan & Nichols Oil Company* case, 28 Fed. Supp. 131.) With this Federal question presented for judicial determination, it was the duty of the Texas courts to make an independent judicial determination of the facts in so far as is necessary to determine the constitutional question, and their failure to make such independent judicial determination is itself a denial of due process of law in

violation of the Fourteenth Amendment to the Constitution of the United States. *Ohio Valley Water Company v. Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527, 528; *Crowell v. Benson*, 285 U. S. 22, 52 S. Ct. 285, 296; *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 56 S. Ct. 720; *United Gas Public Service Co. v. State of Texas et al.*, 303 U. S. 123, 139, 58 S. Ct. 483, 491. The trial court and Court of Civil Appeals denied this right by holding that the mere existence of evidence tending to support the permit at the hearing before the Commission (regardless of its truth or falsity, which was not judicially determined) ends the judicial inquiry, and in sustaining the permit on that basis without considering the undisputed testimony independently adduced on the trial and without making an independent judicial determination of the facts.

While the opinion of the Court of Civil Appeals did not expressly state that the Federal questions here presented were considered and overruled, nevertheless such questions were so involved that their determination was necessary to the disposition of the issues, especially in view of the fact that the Federal question asserted, if correct and enforced, requires a judgment different from that rendered; hence, the failure of the Court of Civil Appeals to overrule expressly the Federal questions does not affect jurisdiction of this Court. *West Chicago Street Railway Co. v. Illinois*, 201 U. S. 506, 26 S. Ct. 518, 521; *Chicago B. & Q. Railway Co. v. Illinois*, 200 U. S. 561, 26 S. Ct. 341, 345; *Schuylkill Trust Co. v. Commonwealth of Pennsylvania*, 296 U. S. 113, 122, 56 S. Ct. 31, 36.

(d) The questions involved are substantial in that petitioners are and will be deprived of large quantities of their property without being accorded a judicial trial and determination of the facts, and the making of such judicial determination is material in that it would necessarily require reversal of the judgment, because the undisputed

evidence on the trial showed that the permit is not in fact supportable under either ground of exception to the rule, but will cause waste, and is illegal, unjust, unreasonable and discriminatory as to petitioners in that it gives permittees great and unnecessary advantage in drainage, enabling them to appropriate to their own use and benefit large quantities of petitioners' oil and will otherwise injure petitioners' leases and wells.

The question of confiscation and discrimination arising through granting a neighboring operator permit to drill an undue number of wells on his tract, in exception to a conservation rule issued under the State's police power, presents a Federal question of substance, which has not heretofore been presented to and determined by this Court, and petitioners believe and represent that the lower courts have not decided such question in accordance with principles of law laid down by decisions of this Court. A direct decision of such question by this Court is of special and peculiar importance in that much litigation has arisen and will arise under the conservation rules, questioning the validity of special orders of the administrative board granting exceptions to the general well spacing rule.

The disposition of the Texas courts to test the validity of such orders on the basis of whether there was substantial evidence before the Commission tending to support its order, refusing to determine the facts judicially where violation of rights under the Federal Constitution are expressly alleged, presents a question of far-reaching importance to the jurisprudence, in that by such holding the court in effect surrenders its constitutional function to exercise independent judicial power, and leaves the final determination of property rights to a mere administrative agency. Such holding leaves a citizen's constitutional rights to the final determination of the Executive Department.

(e) The Federal questions sought to be reviewed were raised in the court of first instance and in the appellate court, and were passed upon by those courts, as follows:

Plaintiff's Original Petition in the District Court contained the following allegations attacking the validity of the permit order:

"10."

"Plaintiff further shows that said order granting the permit to drill the wells in controversy is unreasonable, discriminatory and unjust in fact in its operation against plaintiff, and is in violation of the conservation laws and the well spacing rule of the Railroad Commission applicable to said land and field, and should be annulled by judgment of this Court for the reasons set out hereinabove and because:

\*     \*     \*     \*     \*

"(j) Because, even if the Commission was entitled to consider as evidence the private opinion of applicants' witnesses in reference to increased recovery through operation of wells spaced in violation of Rule 37 as a basis for granting permit for well locations complained of, nevertheless the Railroad Commission has no right or authority to place Defendants Turnbow and W. C. Turnbow Petroleum Corporation in a position of advantage with respect to plaintiff as will enable said defendants to drain large quantities of plaintiff's oil, under the guise of conserving oil and gas; and it being the duty of the Railroad Commission, in the exercise of its power in regulating both the number of wells to be drilled and the amount of oil which may be produced therefrom, to equitably distribute the drilling of wells and the allowable production therefrom in such manner as will not enable defendants and other persons owning interests in the minerals in and under said 2.5 acres to have an advantage in drainage opportunity over adjoining leaseholders, said Railroad Commission if authorized to

grant the permit complained of, at the same time and in the same order should have adjusted the allowable production of the two well locations thus granted defendants, and the allowable of other wells on the original 41 acre portion of the McGrede tract, so that the combined allowable of all wells on said original 41 acre portion of the McGrede tract would not exceed the present allowable of the wells on said 41 acres, exclusive of the two additional well locations granted defendants herein; and by reason of its failure to so adjust the allowable, its order granting said permits on the ground of preventing waste is arbitrary, unreasonable, unjust and discriminatory against plaintiff. In this connection plaintiff shows that at the time of filing of this suit, said original 41 acres had an equality in drainage opportunity with adjoining leases, including plaintiff's lease, without the two wells in suit; that in the absence of such adjustment of allowable the two wells in suit operating in connection with other wells on the original 41 acres will drain large and inestimable quantities of oil and gas from plaintiff's lease and said original 41 acre tract will have a great advantage in drainage opportunity over plaintiff's lease, and the owners of the present component parts of said 41 acres, particularly Defendants Turnbow and W. C. Turnbow Petroleum Corporation, will drain and appropriate to their own use and benefit, without compensation to plaintiff, large quantities of oil and gas underlying plaintiff's lease, which plaintiff's wells would otherwise produce; that if said allowable were so adjusted, such drainage of oil and gas from plaintiff's lease to wells on said original 41 acres would be materially less, and plaintiff would suffer less injury by reason thereof; that in this regard the action of the Railroad Commission in granting such permit without adjusting the allowable denies plaintiff the equal protection of the law and due process of law and discriminates against plaintiff in favor of said defendants, and if it be held and determined that the drilling of two additional wells in this area will prevent waste,

nevertheless the failure of the Railroad Commission to adjust the allowable in connection therewith so as to prevent the above mentioned increase in drainage advantage in favor of the original 41 acres over plaintiff's lease does and will cause an unlawful taking of plaintiff's property for private and public benefit, without compensation to plaintiff; all in violation of the Constitutions of the United States and the State of Texas" (R. 17, 20-22).

Gulf Oil Corporation adopted the foregoing allegation in its Petition in Intervention (R. 30).

The trial court's ruling has been stated. The trial court had before it evidence, hereinafter related, independently adduced on the trial and undisputed (defendants having offered no evidence thereon), establishing that the involved locations are not in fact necessary under either ground of exception to the rule but will cause waste and drain large and inestimable quantities of oil from petitioners' leases and otherwise lessen the value thereof.

In the Court of Civil Appeals petitioners presented their fourth Assignment of Error, asserting that the judgment was erroneous because petitioners proved by unrebutted evidence independently adduced on the trial that the 41 acres was fully protected from drainage, possessed a reasonable opportunity to get its fair share of the oil, did not need these two additional wells for such purposes, and that such two wells will force seven closely spaced offsets, create uneven spacing and withdrawals, and cause waste of oil and gas and injury to petitioners (R. 351-352); their fifth Assignment of Error, asserting that the trial court denied petitioners due process of law in violation of the Fourteenth Amendment to the Constitution of the United States by failing to consider the testimony independently adduced on the trial and to determine judicially the facts (R. 352); and their sixth Assignment of Error, asserting in substance,

that if a conservation basis existed for two additional wells, nevertheless the permit order was unreasonable, unjust and discriminatory in fact, because under the undisputed evidence on the trial, one well on the 2½ acres will produce more than the recoverable oil underlying it, and the other wells on the original 41 acres reasonably protect the whole of same from drainage, and the two additional wells will drain large quantities of petitioners' oil, which petitioners could not entirely prevent even by drilling offset wells, and the Commission's action in granting the two additional wells in the light of the proration order without making the permit conditional that the combined allowable of wells on the 41 acres would not be increased by operation of these two additional wells, which would have materially lessened the resulting injury to petitioners, renders the order discriminatory and confiscatory as to petitioners, in violation of the Fourteenth Amendment (R. 352). The ruling of the Court of Civil Appeals has already been stated.

Petitioners' Motion for Rehearing in the Court of Civil Appeals reasserted the above questions in Grounds Nos. 4, 5 and 6 (R. 360-362), in connection with which they requested said court to file its Findings of Fact and Conclusions of Law on the evidence independently adduced on the trial (R. 361, 362). This motion was overruled as above stated.

The Petition to the Texas Supreme Court for Writ of Error again presented these questions in Assignments of Error Nos. 5 to 10, both inclusive (R. 365-368), and were again presented in their Motion for Rehearing in that court in Grounds Nos. 2 and 3 (R. 369-370). In that the substance of the questions covered by these assignments and grounds has been stated above, we omit restating them here for brevity. The Supreme Court refused Writ of Error and overruled Motion for Rehearing as above stated.

## D.

**Questions Presented.**

1. Whether the administrative order granting Turnbow's permit for two wells as exceptions to the spacing rule to prevent waste and confiscation of property is invalid, in view of the undisputed evidence independently adduced on the trial *de novo* showing that the drilling and operation of the Turnbow wells is not necessary to prevent waste or confiscation of property within the meaning of the field spacing rule, and will cause waste of oil and gas under petitioners' property, and drain large and inestimable quantities of oil from their respective leases and force petitioners to drill and equip at great expense additional wells as offsets which are otherwise unnecessary to the development of their property, and which will not even if they be drilled entirely prevent the drainage from petitioners' leases.

2. Whether, even assuming there was proper evidence before the Commission that the Turnbow wells were necessary from the standpoint of conserving oil, the granting of the permit in the light of the existing proration order allocating production in this area on a per well basis, without at the same time making some provision in the permit fairly protecting petitioners as far as possible from the additional drainage of their leases, which will undisputably result from such wells (such as by providing that operation of the Turnbow wells should not increase the total allowable for the 41 acre tract), renders the permit order illegal, unreasonable, unjust, discriminatory and confiscatory in fact as to petitioners, contrary to their rights under the Fourteenth Amendment to the Constitution of the United States, when the undisputed evidence establishes that one well on the 2½ acres will produce more than the recoverable oil under it, that existing wells on the 41 acres reasonably

protect the whole tract (including the 2½ acres) from drainage, that the two additional wells will drain large quantities of oil from petitioners' leases and force petitioners to drill offset wells, otherwise unnecessary for the development of their property, and even with the drilling of which such drainage will not be entirely prevented.

3. Whether the State courts denied petitioners due process of law in violation of the Fourteenth Amendment to the Constitution of the United States by failing to give effect to the undisputed testimony independently adduced on the trial, and by failing to make an independent judicial determination of the facts on which the above pleaded constitutional questions are based.

#### E.

#### The Facts.

The 2½ acres was voluntarily subdivided from a 41 acre lease in 1934 (R. 45, 214A), while the Railroad Commission's spacing rule was in effect; and the Commission's rule provides (R. 47, 231) and the opinion of the Court of Civil Appeals recognizes (R. 356-357) that this subdivision must be disregarded in administering the spacing rule.

Exhibit 81 (R. 70, 350) is an accurate survey map of the 41 acre tract (41.26 acres), including the 2½ acres, and of the surrounding area (R. 56-59). On the date of the permit (as of which time the validity thereof must be tested under the Texas decisions: *Magnolia Petroleum Co. et al. v. New Process Production Co. et al.*, 129 Tex. 617, 104 S. W. (2d) 1106, 1111; *Railroad Commission v. Magnolia Petroleum Company*, 130 Tex. 484, 109 S. W. (2d) 967, 970; *Humble Oil & Refining Company v. Railroad Commission et al.*, 99 S. W. (2d) 401, 402), the 41 acres had an average density of 5.16 acres per well, exclusive of those in controversy, which was equal to or greater than the

density of various sized surrounding areas compared on the trial and outlined on Exhibit 81 (R. 58-60, 60-66). A geologist and petroleum engineer, witnesses for petitioners, testified on the trial in regard to the reservoir conditions in this area, drainage opportunity, sufficiency of the development and injuries which petitioners will suffer by reason of the two wells in controversy, and we will summarize the facts established by their testimony, which was undisputed on the trial. The sand is continuous in the area, the porosity and permeability being very good and average for the field, or better (R. 86-88). The sand becomes gradually thinner to the east and thicker to the west of the 2½ acres, but each adjacent acre has relatively the same oil content (R. 88-89). All the wells in the area are allowed to produce 20 barrels daily under the Commission's proration order, and are good flowing wells (R. 89, 90). Gas is in solution with the oil in the reservoir, and this makes the oil less viscous (R. 90). The fluid in the reservoir moves from points of higher pressure to points of lower pressure existing at and near the bottom of wells, created by removal of oil (R. 166-167). Tests indicate, where average sand conditions prevail, production of a well will cause a pressure drop and movement of fluid for a distance of 1200 feet around it (R. 166-167). The pressure in this area is normal (R. 167). The 41 acres, exclusive of the Turnbow wells, had an average density of 5.15 acres per well and a daily allowable per acre of 3.87 barrels, and with Turnbow No. 1 would have an average density of 4.58, and with Turnbow's Nos. 1 and 2 would have an average density of 4.12; the adjoining leases were drilled to an average density of 5.35 (R. 91-93, 350A). The Turnbow wells are offsets only to wells on other portions of the 41 acres, and the 41 acres already possessed an offset advantage over the adjacent leases, considering the spacing all the way around the track (R. 93-97); and if the Turnbow wells are

not operated, the existing wells on the 41 acres will drain and produce the oil underlying the  $2\frac{1}{2}$  acres (R. 104-105). The 41 acres had sufficient wells, exclusive of those in controversy, to produce the equivalent of the recoverable oil in place under the tract (R. 98). Under the per well allowable as fixed by the Commission for this area, the more densely drilled tracts are allowed to produce oil at a more rapid rate from the standpoint of acreage and reserves than surrounding areas which are less densely drilled, which causes drainage of oil from the less densely drilled tracts to the more densely drilled tracts where the withdrawal of oil is greater (R. 99). The Turnbow wells will drain oil from petitioners' leases (R. 98, 167-168).

The  $2\frac{1}{2}$  acres with one well would have a daily allowable of 8 barrels per acre, and with two wells would have a daily allowable per acre of 16 barrels (R. 105-106). Humble's adjoining lease had a density of 5.4 acres per well and a daily allowable per acre of 3.66 barrels, and Gulf's adjoining lease had a density of 4.6 acres per well and an allowable of 4.3 barrels per acre per day (R. 91-92). In the surrounding area eight times the size of the  $2\frac{1}{2}$  acres (three times its length and three times its width), there are only four wells, two of which are on the 41 acres, the average density of such surrounding area being one well to 5 acres (R. 105-106). By reason of its density and allowable per acre advantage, the two Turnbow wells will cause drainage of oil from the adjacent tracts to the  $2\frac{1}{2}$  acres and the 41 acres (R. 99). Considering both comparative density and well spacing, the 41 acres was adequately protected from drainage by existing wells when the Turnbow permit was granted, and the operation of the Turnbow wells will increase the drainage opportunity of the 41 acres against the surrounding areas, causing drainage of oil from petitioners' leases to Turnbow's wells (R. 167-168). If the Turnbow wells are not operated, petitioners' leases are pro-

tected from the offset well standpoint as against the 41 acres, but if the Turnbow wells are to be operated, two offsets will be necessary on each petitioner's lease to lessen the drainage therefrom, but the drilling of such offsets would not entirely prevent the drainage (R. 99-102, 168-169). For the same reason the Turnbow wells would require the drilling of five offset wells on a lease of General American Oil Company, making a total of nine offsets (R. 101-103, 350). None of the offsets would comply with the 660-330 foot provisions of the Commission's spacing rule, and would bring about a concentration of drilling (R. 169) in that there would be a total of 18 wells in an area 750 feet wide east and west, and extending 500 feet north of the 2½ acres and 300 feet south thereof (R. 103-104). There is no comparable concentration of wells in the area, and such wells, therefore, will cause uneven spacing of wells (R. 104), uneven withdrawal of oil and a greater pressure drop in this vicinity, which will cause earlier and uneven encroachment of salt water underlying the oil into the oil saturated portion of the sand (R. 90, 169), which will tend to lessen recovery through trapping of oil in the reservoir (R. 107-109, 169-170, 171-172).

The wells in this area normally produce their 20 barrels daily allowable in about 20 minutes, and the reservoir pressure then equalizes at the bottom of the wells in a short time (R. 170). Gas will begin to come out of solution with the oil whenever the reservoir pressure declines to about 750 pounds (R. 161), and a densely drilled area, such as will result from the Turnbow wells, will develop that condition earlier than less densely drilled areas, and free gas will then by-pass the oil, which will become more viscous. The Turnbow wells will advance the time when the the pressure will cease to equalize, thus decreasing the flowing life and producing life of the wells in this area (R. 171). The

situation which will be created by the Turnbow wells will lessen recovery of oil from the field (R. 145-146), and will increase the fire hazard (R. 173). Earlier pumping will increase the operating cost (R. 173). Each of the offset wells will cost \$10,000 to \$12,000 (R. 173).

One well on the  $2\frac{1}{2}$  acres will produce during its life in excess of the amount of recoverable oil under said tract (R. 108-109); and two wells thereon will enable it to recover still more oil by drainage from adjacent tracts, which will decrease the recovery from the adjacent tracts in proportion to the increased recovery from the  $2\frac{1}{2}$  acres (R. 171).

There is no place in this area where there are an insufficient number of wells to recover the underlying recoverable oil, and the area is completely developed (R. 109).

The Railroad Commission held four hearings on Turnbow's applications to drill on the  $2\frac{1}{2}$  acres, July 2, 1934, November 1, 1934, June 24, 1937, and September 23, 1937. At the trial, petitioners offered a transcript of each of said hearings, *for the limited purpose of showing what testimony and proceedings were had before the Commission*, on their allegation that the permit order was not supported by proper evidence and was arbitrary (R. 48, 49, 52, 53-54). Only questions of the title were discussed at the first hearing, and not being relevant to the questions here presented, we omit discussion of it.

At the hearing on November 1, 1934, witness Murchison, a geologist, the sole witness on matters of drainage and development, testified the sand conditions in this area are substantially uniform as to saturation, porosity, and permeability (R. 290), and disregarding the partition of the  $2\frac{1}{2}$  acres from the 41 acres, the whole tract is fully developed (R. 291); that the two Turnbow locations would require nine offset wells, all of which would be less than the distances provided in the spacing rule (R. 294-297), will create

an area of congested drilling, cause uneven spacing and uneven withdrawals, and waste of oil and gas (R. 297), dissipate reservoir energy, cause earlier and uneven encroachment of water, and increase the fire hazard (R. 297-298).

At the June 24, 1937 hearing before the Commission, Turnbow's sole witness, Hudnall, testified the 41 acres is reasonably protected from drainage and has a slight advantage over adjacent leases, disregarding the subdivision and the Turnbow wells (R. 259, 261, 263); that in his opinion the Turnbow wells increase recovery of oil and thereby prevent waste (R. 251-252); that this tract is in the fairway (R. 250); that his opinion regarding increased recovery is based on the view that closer spacing of wells generally than the Commission's rule provides will yield greater recovery of oil than spacing in accordance with the distances provided in said rule (R. 255-256); that this area has very good pressure which equalizes rapidly, enabling free migration of oil through the sand, porosity and permeability thereof being average for the field, and there are no peculiar conditions in the reservoir at this point which would reduce the migratory ability of the oil below its usual ability to migrate (R. 255-256); that in his opinion greater recovery would be obtained from the field if the entire field were drilled to the same density as the Turnbow  $2\frac{1}{2}$  acres (R. 265); that the two Turnbow wells will require nine offsets, of which Humble and Gulf would need two each (R. 261); that the two Turnbow wells during their life will produce about 149,000 barrels of oil by drainage from tracts adjoining the  $2\frac{1}{2}$  acres (R. 263).

At the September 23, 1937 hearing, Turnbow's sole witness, Griffin, testified that if you disregard the subdivision and consider the  $2\frac{1}{2}$  acres as a part of the entire 41 acre tract for development purposes, the two Turnbow wells are not needed, the 41 acres being reasonably protected

from drainage, reasonably developed, and has an opportunity to receive its fair share of the oil (R. 315-316); that in his opinion the Turnbow wells will increase the ultimate recovery of oil by lessening the drainage area for individual wells (R. 312), explaining that he had not studied the sand conditions in this area (R. 316-317), but he believed them to be better than average for the field (R. 318) in that the wells have good potential and are capable of flowing large quantities of oil (R. 320); that his opinion regarding increased recovery is based on the proposition that the closer together the wells are, the less waste there will be, that he sees no reason for having wells widely spaced, that he applies such opinion to the entire field—the more wells you drill anywhere in the field, the more oil you will recover, and his opinion regarding increased recovery by these two wells was not based on any peculiar conditions in the reservoir in this area, because he knows of no such peculiar conditions (R. 321-323); that the Turnbow locations will force seven offsets (R. 326) and bring about a concentration of drilling on and around the  $2\frac{1}{2}$  acres (R. 327-328); that even spacing of wells will prevent waste (R. 333).

## F.

### Specification of Errors.

The Court of Civil Appeals erred:

(1) In upholding the permit order and in affirming judgment of the trial court denying petitioners' prayer for relief, there being undisputed evidence independently aduced on the trial showing the Turnbow wells are not necessary under either ground of exception to the field spacing rule and will cause waste of oil and gas, that there were already sufficient wells on the 41 acre tract (which includes the Turnbow  $2\frac{1}{2}$  acres for administrative purposes) to rea-

sonably develop and protect the whole tract from draining and to drain the oil underlying the  $2\frac{1}{2}$  acres, that one well on the  $2\frac{1}{2}$  acres will produce more than the recoverable oil underlying the  $2\frac{1}{2}$  acres, and each of the two wells permitted thereon will drain large quantities of oil from petitioners' leases and force petitioners to drill and equip at great expense offset wells which are otherwise unnecessary for developing their property and which will not entirely prevent such drainage even if drilled, and showing that the two Turnbow wells will decrease the flowing life and producing life of wells in this area and cause other injuries to petitioners; said orders being as a matter of law illegal, unjust, unreasonable, discriminatory, and confiscatory as to petitioners, denying them equal protection of the law and taking their property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

(2) In failing and refusing to make or cause to be made an independent judicial determination of the facts from the evidence adduced on the trial, to determine whether the order permitting the Turnbow wells, in its operation and effect, denies petitioners the equal protection of the law and deprives them of their property, without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

(3) In holding the permit valid and in affirming the judgment of the trial Court against petitioners on the sole ground that testimony was offered at the hearing before the Railroad Commission to the effect that the locations in controversy will prevent waste on the theory that the general provisions of the field spacing rule cause rather than prevent waste, and that the more wells drilled and the closer they are spaced anywhere in the field, regardless of whether

they comply with the minimum distances provided in the spacing rule, will increase recovery of oil; the Court having failed to consider and give effect to the undisputed evidence adduced on the trial *de novo* showing said wells are not necessary under either ground of exception to the rule, but will cause waste of oil and gas, and will greatly drain oil from and otherwise injure petitioners' leases.

(4) In upholding the permit order and judgment of the trial court, even assuming that there was proper evidence before the Railroad Commission that the Turnbow wells were necessary from the standpoint of conserving oil, because the granting of the permit, in the light of the existing proration order allocating production in this area on a per well basis, without at the same time making some provision in the permit fairly protecting petitioners as far as possible from additional drainage of their leases, which will undisputably result from such wells, (such as by providing that operation of the Turnbow wells should not increase the total allowable for the 41 acre tract) renders the permit illegal, unreasonable, unjust, discriminatory, and confiscatory in fact as to petitioners, contrary to their rights under the Fourteenth Amendment to the Constitution of the United States, there being undisputed evidence that there were already sufficient wells on the 41 acre tract (which includes the Turnbow  $2\frac{1}{2}$  acres for administrative purposes) to reasonably develop and protect the whole tract from drainage and to drain the oil underlying the  $2\frac{1}{2}$  acres, that each of the two wells on the  $2\frac{1}{2}$  acres will produce more than the recoverable oil under such  $2\frac{1}{2}$  acres, and each of such two wells will drain large quantities of oil from petitioners' leases, and will otherwise injure them, and will force petitioners to drill and equip at great expense offset wells which are otherwise unnecessary for the

development of their property, and which, even if drilled, will not entirely prevent such drainage.

G.

### Reasons for Allowance of the Writ.

1. The Court of Civil Appeals herein held (133 S. W. (2d) 191, 192) that the subdivision of the 2½ acres from the 41 acres in 1934 is required to be disregarded under the Commission's rule (R. 9-10, 195), the spacing provisions of which have been in effect since prior to that time—R. 7-9, 178-195), as established by final judgment in a prior suit between the same parties involving the same wells (99 S. W. (2d) 1096).

The undisputed evidence, both before the Railroad Commission and in the trial court, showed the 41 acres was fully protected from drainage and had an advantage in well spacing, density, allowable and drainage opportunity over the adjoining tracts. Therefore, the Turnbow wells could not be legally granted under the clause in the Commission's rule providing for exceptions when "necessary to prevent confiscation of property", under a well settled line of Texas decisions, and the granting of permit on that ground was illegal and arbitrary: *Gulf Land Co. v. Atlantic Refining Co.*, 131 S. W. (2d) 73, headnotes 28 and 29; *Sun Oil Co. v. Railroad Commission*, 68 S. W. (2d) 609, affirmed 84 S. W. (2d) 693; *Turnbow v. Barnsdall Oil Co.*, 99 S. W. (2d) 1096 (writ refused). Hence, if the permit is sustainable at all, it must be under the exception clause where "necessary to prevent waste." The trial court and Court of Civil Appeals upheld the permit under that ground, holding there was "substantial evidence" before the Railroad Commission of necessity to prevent waste (R. 41, 356-357).

When the Commission adopted the 660-330 foot rule for the East Texas Field, it expressly found such spacing was necessary to prevent waste (R. 46-47, 220, 222). There is no statutory authority for the spacing rule except on that premise. In *Stanolind Oil and Gas Co. v. Midas Oil Co.*, 123 S. W. (2d) 911, 915 (writ dismissed), this same Court of Civil Appeals held:

*"If there be no reasonable relationship, therefore, between the spacing provisions of the rule and the prevention of waste, such spacings become purely arbitrary, and the Commission has exceeded its authority in prescribing them. The validity of the rule has been repeatedly upheld. The very term 'exception' thereto necessarily implies a deviation or departure from the general rule. If an exception be necessary to prevent waste, the necessary implication is that facts exist which make inapplicable the general spacing rule. That is, that underground conditions, e.g., sand thickness, saturation, porosity, permeability, well potentials bottom hole pressure, and drainage in the area of the particular well, differ from those obtaining generally, and on which the rule itself is predicated."* (Italics ours.)

The undisputed evidence both before the Commission and the trial court showed there are no exceptional conditions in the reservoir rendering the general spacing rule less applicable here than to the field generally; and it is apparent that opinion testimony based on the theory, as it admittedly was here, that the more wells you drill anywhere in the field and the closer they are spaced, the more oil will be recovered, "resolves itself into an attack upon the validity of Rule 37, although under the guise of an application for a permit as an exception to the rule", as unanimously held by the same Court in *Civil Appeals in Railroad Commission v. Marathon Oil Company*, 89 S. W.

(2d) 517, 518 (writ of error refused). The effect of such testimony is that the restrictive provisions of the rule cause waste in every instance, and every conceivable location, regardless of spacing, is necessary under the exception "to prevent waste." In the Marathon case the court further held the Commission has the power to amend or abrogate its rule, "but until such action or until the rule is set aside in a direct proceeding instituted for that purpose, it is the imperative duty of the courts to enforce it." Other Texas cases holding this character of testimony does not justify an exception under the "waste" ground, because it merely attacks the wisdom of the general rule itself, are: *Arkansas Fuel Oil Company v. Reprimo Oil Company*, 91 S. W. (2d) 381, 384 (writ dismissed); *Murphy v. Turman Oil Company*, 97 S. W. (2d) 485, 487 (writ of error refused); *Magnolia Petroleum Company v. Railroad Commission of Texas*, 105 S. W. (2d) 787, 789; *Railroad Commission v. Gulf Production Company*, 115 S. W. (2d) 505, 507; *Tide Water Associated Oil Company v. Railroad Commission*, 120 S. W. (2d) 544, 546.

In *Sun Oil Company v. Railroad Commission*, 68 S. W. (2d), 609, 612, it was held:

"The Commission is the duly constituted agency of the state to ascertain what constitutes waste of oil and gas. This it must do after hearings and a careful investigation with reference thereto. *And when it has promulgated a general rule, a power expressly delegated to it, after a full and careful consideration of the subject to which such rule related, as amended rule 37 was, it cannot thereafter even itself arbitrarily grant exceptions thereto which would in effect indutiably destroy the efficacy of the rule itself.*" (Italics ours.)

In *Ward v. Board of County Commissioners*, 253 U. S. 17, 40 S. Ct. 419, 421, the Supreme Court held it is within its

province to inquire not only whether a Federal right was denied in express terms, but whether it was denied in substance and effect as by putting forward non-Federal grounds of decision that were without any fair or substantial support. We urge that such is the case here, and that petitioners should not be deprived of an adjudication of the Federal questions presented, nor should the courts allow to stand a permit order which is indisputably discriminatory and confiscatory as to petitioners, on the flimsy ground that an exception can be granted to Turnbow on testimony which is in substance and effect that the spacing provisions of the rule are unwise and cause waste in their general application, the Commission at the same time leaving such rule in effect and undertaking to enforce it against petitioners and others in the field. The holding of the Court of Civil Appeals that testimony attacking the wisdom of the rule is substantial evidence of a right to an exception *under* the rule is without fair or substantial support in logic or reason, and is directly contrary to their prior decisions above cited, none of which the court discussed or attempted to distinguish in its opinion.

2. The testimony relied upon by the Court of Civil Appeals to support the permit order was testimony introduced at the hearing before the Commission. It was not introduced for all purposes on the trial, but solely for the limited purpose of showing what testimony and proceedings were had before the Commission, on petitioners' contention that the permit was arbitrarily granted without any legal evidence having been introduced before the Commission to support its order. The Texas Supreme Court held in *Magnolia Petroleum Company v. New Process Production Company*, 104 S. W. (2d) 1106, 1111, "when the ruling of the Commission is appealed to the District Court of Travis County, such court is not confined to the evidence heard by

the Commission, but may hear other proper evidence bearing on the issues involved"; and in *Railroad Commission v. Magnolia Petroleum Company*, 109 S. W. (2d) 967, 970, said court held: "The conditions as they existed when the Railroad Commission acted is the controlling inquiry before the District Court in cases of this character, not what evidence was heard by the Commission \* \* \*." In *Empire Gas and Fuel Co. v. Railroad Commission*, 94 S. W. (2d) 1240, 1244 (writ refused), the Court of Civil Appeals, Third District, held:

*"While the transcript of the evidence before the commission would not in and of itself be competent as proof on the issues presented to the trial court, the proceeding there being a trial de novo, determinable by competent proof under the rules of evidence, where, as here, it was alleged that the commission acted without evidence, consideration of the record of the hearing before the commission would, it seems to us, be the most practical way of determining that question."* (Italics ours.)

In the instant case, the court below has given *conclusive* effect to the testimony at the hearing before the Commission, disregarding the fact that it was introduced at the trial for a mere limited purpose, and disregarding all testimony independently adduced by petitioners at the trial. The court below has not attempted to weigh the testimony and judicially determine the facts in connection with petitioners' allegation that the order violates their rights under the Federal Constitution. The writ should be granted because such procedure of itself denies petitioners due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, as held in the cases cited on page 8, *supra*. The Texas courts have denied a trial in the true sense, and have left the determination of petitioners' constitutional rights solely to a mere adminis-

trative board by refusing to review its action because, they say, there was testimony uttered before the Commission tending to support the permit order, the truth or falsity of which testimony has not yet been decided by any court in this case. Even if the testimony before the Commission had been introduced *for all purposes*, it would nevertheless have been the duty of the courts to weigh the testimony independently adduced on the trial along with such testimony before the Commission to determine whether in fact petitioners are denied the equal protection of law and are deprived of their property without due process of law in violation of the Federal Constitution. This the trial court did not do because its judgment expressly makes the sole finding that there was substantial evidence before the Commission and no attempt is made to weight the evidence independently adduced before the court on the trial (R. 41). The writ should be allowed in order to afford petitioners an independent judicial determination of facts on the Federal questions presented.

3. The undisputed testimony, both before the Commission and on the trial, shows the 41 acre tract, which includes the 2½ acres, was fully protected from drainage, and in fact had an advantage over the adjoining leases, including petitioners'; that the two Turnbow wells will increase such advantage and result in drainage of large quantities of oil from petitioners' property, which drainage petitioners cannot prevent even by drilling offsets at great expense, and which offsets are not otherwise necessary to the development of their leases; will bring about a concentration of drilling and uneven withdrawals which will lessen the flowing and producing life of petitioners' nearby wells, and increase the expense of operating them, resulting in earlier abandonment; that one well on the 2½ acre tract would produce more oil than the recoverable oil under it, whereas two wells thereon will enable the permittees to drain vastly

greater quantities of oil from the neighboring tracts. Petitioners being unable to fend for themselves in view of the fact that the Railroad Commission regulates both the number of wells to be drilled and the allowable production therefrom, the granting of two wells to the permittees under the circumstances denies petitioners the equal protection of the law and causes and will cause a taking of their property without due process of law in violation of the Fourteenth Amendment. Petitioners' hands are tied by the Commission's rules, and they are unable to protect themselves from this invasion of their constitutional rights unless the courts are willing to decide the facts and exercise their time-honored judicial functions instead of leaving them to the final determination of the administrative body. The writ should issue so that this Court may protect petitioners' constitutional rights which are directly involved and which are taken from them by the judgment complained of.

4. Even if there were some basis in the conservation laws for the permit order complained of, which petitioners do not concede, nevertheless the writ should be granted, because the Railroad Commission had before it testimony by Turnbow's own witnesses showing, and the undisputed proof on the trial showed that the granting of these two permits in the light of the existing proration order would result in the drainage of great additional quantities of oil from petitioners' property. The Railroad Commission "must be fair and must not indulge in unreasonable discrimination \* \* \* between different tracts of land in the same field." *Gulf Land Co. v. Atlantic Refining Co.*, 131 S. W. (2d) 73, 85. It has the power and duty to distribute the wells and the allowable production as between tracts so that each owner may receive only his just part of the oil and gas. *Brown v. Humble Oil and Refining Company*, 83

S. W. (2d) 935; *Rowan and Nichols Oil Co. v. Railroad Commission*, 28 Fed. Supp. 131, affirmed 107 F. (2d) 70. The undisputed testimony on the trial showed that if the permit had been conditioned so that the operation of the two Turnbow wells would not have increased the total allowable for the 41 acres from which it was subdivided and of which it is a part for purposes of administering the conservation rules, the injury to petitioners would have been materially lessened (R. 109-110, 142). Therefore, if any basis existed for these two additional wells, nevertheless there was no reason justifying the discrimination and taking of petitioners' property which follows from the unconditional granting of the permit for two wells in the light of the existing proration order. The police power cannot be used as a tool of oppression, nor for the purpose of benefiting one at the expense of another. There was a way open to the Commission to accomplish fully any legitimate objective without placing the permittees in position so greatly to drain petitioners' oil, and in the light of such facts the permit is so unjust, unreasonable, and discriminatory as to petitioners that it violates their rights under the Federal Constitution, for which additional reason the writ should be granted.

WHEREFORE, petitioners respectfully pray that the writ of certiorari be issued to the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, to the end that this Court may review and determine this cause on the full and complete transcript of the record and proceedings in the case numbered and entitled on its docket 8842, *Humble Oil & Refining Company et al.*, Appellants, *vs.* *W. C. Turnbow et al.*, Appellees, and that the judgment of said Court of Civil Appeals be reversed by this Honorable Court, and that your petitioners may have such other and

further relief in the premises as to this Honorable Court may seem proper and just.

HUMBLE OIL & REFINING COMPANY,  
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